

In the Matter of:

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Mynor Abdiel Tun-Cos, et al. vs. B. Perrotte, et al.

December 22, 2017

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Court Reporting  
Videography  
Videoconferencing

Phone: 703-837-0076  
Fax: 703-837-8118  
Toll Free: 877-837-0077

1010 Cameron Street  
Alexandria, VA 22310  
[transcript@casamo.com](mailto:transcript@casamo.com)

1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE EASTERN DISTRICT OF VIRGINIA  
3 Alexandria Division  
4

5 -----:  
6 MYNOR ABDIEL TUN-COS, et al., :  
7 Plaintiffs, :  
8 vs. : Case No.  
9 B. PERROTTE, et al., : 1:17-cv-00943  
10 Defendants. :  
11 -----:

12 Alexandria, Virginia  
13 Friday, December 22, 2017  
14

15 The above-entitled matter came on to be  
16 heard before the HONORABLE ANTHONY J. TRENGA, Judge in  
17 and for the United States District Court for the  
18 Eastern District of Virginia, Alexandria Division,  
19 located at 401 Courthouse Square, Alexandria, Virginia,  
20 commencing at 10:38 a.m., when were present on behalf  
21 of the respective parties:  
22

## 1 A P P E A R A N C E S

2

3 On behalf of Plaintiffs:

4 HALLIE NODGAARD RYAN, ESQUIRE

5 SIMON SANDOVAL-MOSHENBURG, ESQUIRE

6 Legal Aid Justice Center

7 6066 Leesburg Pike, Suite 520

8 Falls Church, Virginia 22041

9

10 MICHELLE WILLAUER, ESQUIRE

11 Covington &amp; Burling, LLP

12 One City Center

13 850 Tenth Street, Northwest

14 Washington, D.C. 20001

15

16 On behalf of Defendants:

17 DENNIS CARL BARGHAAN, JR., ESQUIRE

18 Assistant United States Attorney

19 United States Attorney's Office

20 2100 Jamieson Avenue

21 Alexandria, Virginia 22314

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A P P E A R A N C E S

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(Continued)

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On behalf of Defendants:

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PAUL WERNER, ESQUIRE

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Constitutional Torts Branch, Civil Division

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U.S. Department of Justice

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2100 Jamieson Avenue

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Alexandria, Virginia 22314

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1 P R O C E E D I N G S

2 THE CLERK: Civil Action Number  
3 1:17-cv-943, Mynor Abdiel Tun-Cos, et al. versus B.  
4 Perrotte, et al.

5 Will counsel please identify themselves for  
6 the record.

7 MS. RYAN: Good morning, Judge. Hallie  
8 Ryan with the Legal Aid Justice Center for the  
9 plaintiffs. I'm here with my colleague, Simon  
10 Sandoval-Moshenberg and Michelle Willauer in the  
11 gallery with Covington and Burling.

12 THE COURT: All right. Welcome.

13 MS. RYAN: Thank you.

14 THE COURT: Good morning.

15 MR. BARGHAAN: Good morning, Your Honor.  
16 Assistant United States attorney Dennis Barghaan on  
17 behalf of the individual defendants. With me today  
18 is Paul Werner from the Civil Division,  
19 Constitutional and Specialized Tort Litigation staff,  
20 and he will argue the cause on behalf of the  
21 defendants today.

22 THE COURT: All right. We're here on

1 defendants' motion to strike seven additional  
2 plaintiffs or alternatively to have those claims  
3 severed. I have reviewed the briefing. I'd be  
4 pleased to hear anything else you'd like to say that  
5 you don't think you-all have already told the Court.

6 MR. WERNER: Thank you, Your Honor. May it  
7 please the Court. My name is Paul Werner, as my  
8 colleague mentioned, and I represent the five  
9 individual defendants in this matter.

10 We have all of our arguments out on the  
11 papers, Your Honor, but I'd just like to point out  
12 that the concern here from the individual defendants  
13 is based upon how the plaintiffs are trying to bring  
14 all these claims together that involve two separate  
15 incidents, two sets of plaintiffs, two sets of  
16 defendants, two different dates --

17 THE COURT: But they have alleged  
18 essentially -- I'm not sure if they used this term,  
19 but essentially a pattern or practice that really  
20 straddles both of these events, haven't they?

21 MR. WERNER: That's correct, Your Honor.  
22 But these are individual capacity lawsuits against

1 individuals.

2 THE COURT: But just from a purely case  
3 management perspective, doesn't it make sense to have  
4 all these claims in one case -- all these plaintiffs  
5 in one case? It would certainly facilitate more  
6 efficient discovery I would think. It wouldn't  
7 subject your clients to multiple depositions. And to  
8 the extent that they need to be severed for the  
9 purposes of trial, that's a decision the Court can  
10 make down the road. Doesn't that all make sense?

11 MR. WERNER: We recognize that, Your Honor.  
12 I guess the concern that we have is where is the  
13 limiting principle here in terms of when do we say  
14 that plaintiffs and defendants cannot be joined into  
15 the same suit. And we have concerns about how long  
16 this case could become in the event that additional  
17 plaintiffs are added into this complaint.

18 THE COURT: All right. But you have here  
19 incidents that were, what, a week apart?

20 MR. WERNER: Approximately nine days, Your  
21 Honor.

22 THE COURT: And they've alleged similar

1 methodologies that were used, if you want to use that  
2 term, in terms of what they're complaining about. So  
3 there is some facial relatedness here. It's not as  
4 if these two claims are completely -- are complete  
5 strangers to each other.

6 MR. WERNER: That's correct, Your Honor00.  
7 They do allege that the first -- I guess in time, the  
8 first incident on February 8th was a ruse. There's  
9 one plaintiff who alleges that. They don't allege  
10 that for February 17th. So that would be a  
11 difference.

12 And in terms of discovery, Your Honor,  
13 there are different defendants, as we pointed out in  
14 our briefs here, and there are many more individuals  
15 on the February 8th incident who are alleged to have  
16 been in that house. And so in terms of discovery,  
17 there could be much more lengthy discovery going on  
18 for the first incident than for the second incident,  
19 which seems to be a more limited universe effect. So  
20 in terms of discovery, it might be longer for those  
21 defendants who had nothing to do with the February  
22 8th incident who would have to be involved in that



1 discovery longer than they would otherwise have to,  
2 but I understand Your Honor's point.

3 THE COURT: All right. Thank you.

4 MR. WERNER: Thank you, Your Honor.

5 THE COURT: Counsel.

6 MS. RYAN: Good morning, Your Honor.

7 THE COURT: Good morning.

8 MS. RYAN: Just to address quickly  
9 defendants -- some of the admissibility concerns, I  
10 think Your Honor is right that there's substantial  
11 overlap here. There is -- if the Court were to sever  
12 the cases just from a common sense standpoint, Your  
13 Honor is absolutely right that we do allege a series  
14 of pattern of conduct on behalf of this team of ICE  
15 agents.

16 Even if the cases were to be severed,  
17 there's a good chance that at least some of the  
18 evidence from either case would be admissible in  
19 either trial. For instance, plaintiffs allege that  
20 in the February 8th incident, one of the ICE agents  
21 asked one of the plaintiffs if there were other  
22 Spanish families living on that street. That's

1 certainly evidence that would go to motive of the  
2 February 17th incident that's completely admissible  
3 under 404(b). Other -- Modus operandi is another --  
4 goes to identity also under 404(b). So just from a  
5 common sense standpoint, there is substantial  
6 overlap. The standard that defendants want to hold  
7 plaintiffs to in this case is just simply not  
8 supported by Rule 20.

9 We've alleged a series of transactions and  
10 occurrences, the same setting. These incidents  
11 happened before dawn nine days apart in neighborhoods  
12 six miles away from each other. Both neighborhoods  
13 were known to have high Latino populations, single  
14 team of ICE agents. Both of the incidents involved  
15 suspicionless (sic) stops based nothing more on race  
16 or ethnicity. The only difference is that they  
17 caught Mr. Tun-Cos after he had gotten into his car  
18 as opposed to Mr. Valasquez Perdomo before he got  
19 into his car. Both times they used a photo of a  
20 supposed target of the enforcement action to either  
21 instigate or prolong the stop. They demanded entry  
22 in very similar ways to get into the plaintiffs'

1 homes. They required that each plaintiff produce  
2 identification. And when that identification did not  
3 affirmatively prove that they were in this country  
4 with lawful immigration status, they arrested them  
5 without any evidence going towards their immigration  
6 status.

7 So these are truly, you know, pattern-type  
8 behavior. The conduct was nearly identical in each  
9 case. There's no question that there's, you know,  
10 questions of law, in fact, common to these incidents,  
11 and the case law really supports this sort of -- this  
12 type of case moving forward. So we would just -- you  
13 know, unless you have any other questions for us, we  
14 would just urge the Court to deny their motion.

15 THE COURT: All right.

16 MS. RYAN: Thank you.

17 THE COURT: Counsel, I'll give you the last  
18 word if you have anything else that you would like to  
19 say.

20 MR. WERNER: Thank you, Your Honor. Just  
21 on several points that plaintiffs' counsel made. In  
22 terms of the admissibility of incidents that

1 happened -- of allegations of events that happened on  
2 February 8th as to February 17th, that's exactly our  
3 concern in terms of having individual defendants here  
4 who may not have been involved in the February 8th  
5 incident, having those sorts of incidents coloring  
6 how a jury might view what they did on February 17th.  
7 So that is really our strong concern of undue  
8 prejudice to the individual defendants, seeing as  
9 though they are being sued in their individual  
10 capacities.

11 In terms of the case law, we cited numerous  
12 cases to the Court involving individual capacity  
13 claims where the courts did not permit -- it's just  
14 one case. It's the Stojcevski case -- I believe  
15 that's how it's pronounced -- where you had two  
16 brothers who came into jail on the same day. Both  
17 alleged that they received improper medical  
18 treatment. And the court said we recognize that  
19 they're bringing a policy and practice claim, but we  
20 are going to sever these claims because otherwise all  
21 the prisoners could sue together, and that's one of  
22 our concerns here. Where is this limiting principle

1 -- why couldn't all sorts of plaintiffs come together  
2 and sue a whole slew of ICE agents together in one  
3 case, and we have concerns about that. Otherwise,  
4 unless Your Honor has any further questions --

5 THE COURT: I don't. Thank you.

6 MR. WERNER: Thank you, Your Honor.

7 THE COURT: I've reviewed this matter which  
8 is before the Court on defendants' motion to strike  
9 the seven additional plaintiffs and their claims or  
10 alternatively to sever those claims. As I indicated,  
11 I think the most efficient way to go forward at this  
12 point is to allow these additional plaintiffs to be  
13 joined. And so for those reasons, I'm going to deny  
14 the motion, but it's without prejudice to any  
15 subsequent motions to sever and certainly without  
16 prejudice to any evidentiary issues that may -- the  
17 Court may need to deal with with respect to how the  
18 case is tried. So the Court will issue an order.

19 MR. WERNER: Thank you, Your Honor.

20 MS. RYAN: Thank you, Your Honor.

21 THE COURT: Court will stand in recess.

22 (Whereupon, at 10:47 a.m., the

1 proceedings concluded.)

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1 COMMONWEALTH OF VIRGINIA AT LARGE, to wit:

2 I, LAQUICIA THOMAS, Court Reporter and Notary  
3 Public in and for the Commonwealth of Virginia at  
4 Large, and whose commission expires February 28, 2018,  
5 do certify that the foregoing is a true, correct, and  
6 full transcript of the proceedings.

7 I further certify that I am neither related to  
8 or associated with any counsel or party to the  
9 proceedings; nor otherwise interested in the event  
10 thereof.



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LaQuicia Thomas

Notary Public

Commonwealth of Virginia at Large

Notary No. 7363169

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